Miriti v Murianki (Suing on behalf of Agusta Karigu Murungi Deceased) (Civil Appeal E010 of 2020) [2022] KEHC 16337 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E010 OF 2020

EM MURIITHI, J

DECEMBER 16, 2022

BETWEEN

STANLEY MIRITI .... APPELLANT

AND

JULIUS MURUNGI MURIANKI .... RESPONDENT

SUING ON BEHALF OF AGUSTA KARIGU MURUNGI DECEASED

(Being an appeal from the Ruling of Honourable S. N Abuya (SPM) delivered on 19/10/2020 in Meru CMCC No. 202 of 2012)

JUDGMENT

1. The respondent herein, the plaintiff in the trial court, sued the appellant for compensation for personal injuries by a plaint filed on July 20, 2012 seeking special damages of Ksh 29,300 plus interest, general damages under the *Law Reform Act* and the *Fatal Accidents Act* plus costs and interest at court rates. When the appellant failed to enter appearance and file his defence after being served with the summons to enter appearance and the pleadings, the court on May 28, 2013 entered judgment for the respondent, and the matter proceeded for formal proof on June 16, 2014, when the respondent and his witness testified.

2. In its judgment delivered on October 22, 2014 in the presence of both parties, the trial court found the appellant to have been wholly liable for the accident and awarded Ksh1,200,000 for loss of dependency, Ksh 200,000 for loss of expectation of life and special damages of Ksh 29,350 together with costs and interest. The appellant filed an application dated June 22, 2020 seeking to have the interlocutory judgment entered herein set aside and leave to enter appearance and file the defence. When the appellant failed to appear in court on July 6, 2020, the court proceeded to dismiss the application with costs.

3. The appellant moved with speed to have the order of July 6, 2020 dismissing the application dated June 22, 2020 set aside and the same was reinstated for determination on merits, on September 14, 2020. The application was subsequently heard on merits and the court on October 19, 2020 dismissed the same with costs to the respondent, and marked the file as closed.

The Appeal

4. Aggrieved by the said dismissal of his application dated June 22, 2020 *vide* the ruling of October 19, 2020, the appellant filed a memorandum of appeal in this court on October 27, 2020 raising 4 grounds as follows:

    1. The learned magistrate erred in law and fact in finding that the appellant was served with the court summons but failed to enter appearance and defend the suit.

    2. The learned magistrate erred in law and fact in failing to apply the correct principles in setting aside of judgment and therefore reached a wrong finding on the application by the applicant.

    3. The learned magistrate erred in law and fact by finding that the defendant was duly served but failed to enter appearance yet facts and circumstances of the case did not support the finding.

    4. The learned magistrate erred in law and fact by refusing to set aside the judgment and holding the appellant liable for the accident yet he did not appear to defend himself.

Submissions

5. The appeal was heard by way of written submissions which were filed on July 27, 2022 and July 28, 2022 respectively. The appellant submits that if the irregular default judgment is set aside, the respondent will not suffer any prejudice that cannot be cured by costs, and relies on *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* (2021) eKLR. He urges the court to exercise its wide discretionary powers and set aside the impugned ruling and allow the appeal with costs in order to ensure that justice is served to both parties.

6. The respondent points out some glaring anomalies in the manner in which the appeal had been lodged, as the ruling and/or order appealed against and the respondent's submissions on the said application have not been availed in the record of appeal, as required by order 42 rule 13 of the *Civil Procedure Rules*, thus making the appeal fatally defective for want of particulars, and relies on *Samson Kimama v Daniel Muyuri & another* (2020) eKLR. He distinguishes between a regular judgment and an irregular judgment, as was explained in *Fidelity Commercial Bank Ltd v Owen Amos Ndung'u & another* HCC No 241 of 1998 (UR) and *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another* (2016) eKLR.

7. The respondent urges that the summons to enter appearance were validly served upon the appellant through his agent and manager of his hotel, one Julia Bundi and an affidavit of service sworn by the process server, Baylon Mutahi filed, and since the process server was not cross examined, it must be presumed that his averments were indeed correct. He urges that the averments made in the draft defence were mere denials, and he will be greatly prejudiced if the appeal is allowed, as the memory of the witnesses has since faded because the accident occurred way back in 2009. He urges that the entry of judgment was regularly done and the said judgment was a regular judgment for all intents and purposes, therefore the appeal ought to be dismissed with costs, and relies on *Shadrack arap Baiywo v Bodi Bach* (1987) eKLR and *Kenya Orient Insurance Limited v Cargo Stars Limited & 2 others* (2017) eKLR.

Analysis and Determination

8. This being a first appeal, this court is required to consider the evidence adduced, evaluate it and draw its own conclusions bearing in mind that it did not hear and see the witnesses who testified.(See *Selle & another v Associated Motor Boat Company Ltd & others* [1968] EA 123).

9. An issue has been raised that the appeal is fatally defective for want of the ruling and/or order appealed against and the respondent's submissions. It is true that the appellant, either by accident or mistake did not include the ruling appealed against in the record of appeal, but since the same is in the lower court's record, which is before this court, that failure is not fatal. This court has also ruled on the impact of failure to attach a judgment, ruling, decree or order appealed from in an appeal to the High Court and found that these may be supplied by a supplementary record of appeal.

10. Grounds 1 and 3 are on service while grounds 2 and 4 touch on setting aside of the judgment, thus the issues for determination are whether service was proper and whether the judgment ought to be set aside.

11. Order 10 rule 2 of the *Civil Procedure Rules* provides that:

> "Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process -server appointed by the court."

12. Order 10 rule 11 of the *Civil Procedure Rules* provides for setting aside judgment as follows:

> "Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

13. Baylon Mutahi, a licenced process server swore an affidavit of service on May 21, 2013 averring that, after receiving summons from the respondent on November 14, 2012-

> "On the same day at around 11.45 am I proceeded to Kangeta Market near Maua town at the defendant's Hotel known as Irimba Makuti Hotel where I introduced myself to the manager one Julia Bundi and the purpose of my visit. She called the defendant via his cell phone where he authorized her to receive the aforesaid documents on behalf. At the time of service the defendant's hotel was shown to me by the plaintiff herein defendant herein who accompanied me."

14. After the appellant neglected to enter appearance and/or file his defence within the stipulated time, the respondent requested for interlocutory judgment on May 22, 2013 which was duly entered on May 28, 2013. The matter was then set down for formal proof hearing and judgment was subsequently entered in favour of the respondent on October 22, 2014.

Regular or Irregular Judgment

15. Was that a regular judgment or an irregular judgment, which ought to be set aside *ex debito justitiae*? The distinction between the two and its implications was considered by the Court of Appeal in *James Kanyita Nderitu v Maries Philotas Ghika & Another* (2016) eKLR as follows:

> "In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to

file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal, Koteh*, AIR 1955 SC 664, at 711:

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

16. This court, without any doubt finds that the judgment herein was regular as service was proper. Having found that the service herein was proper and therefore the judgment was regular, the next question is whether the same ought to be set aside.

17. The test for setting aside a regular *ex parte* judgment is threefold, that (1) whether there is reasonable explanation for the delay; (2) whether there is a defence on merits; and (3) whether the respondent would in any way be prejudiced.

Defence On The Merits

18. On whether the appellant had a good defence on merits, (Sheridan J) in *Sebei District Administration v Gasyali & others* (1968) EA 300 was of the view that:

> "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a

hearing should be the last resort of the court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should, I consider, have been visited with a severe order as to costs, and permitted to defend."

19. The court has looked at the draft defence annexed to the appellant's application dated June 22, 2020, and notes that the issues raised therein are triable, as they question the causation of the accident and the person to blame for the same. Therefore, justice of this case demands that the appellant's defence be heard on its merits.

20. Notwithstanding that judgment was entered way back on October 22, 2014, the notice of entry of judgment was served upon the appellant's insurer belatedly on June 10, 2020. That clearly explains the delay.

The Trial Court's Finding

21. The trial court found that, "the draft defence annexed to the application is not a defence on merit as it does not raise triable issues and it contains mere denials.

22. The trial court also found that the respondent would be greatly prejudiced if the *ex parte* judgment was set aside as the accident occurred way back in 2009 and the memory of the witnesses may have already faded.

23. The trial court further found that the appellant had not advanced any good reason for his delay to defend the claim despite having been properly served.

24. On the findings of this court above, the trial court's conclusion must be set aside.

Costs

25. Although it is indeed true that the respondent will be prejudiced if the judgment is set aside, that prejudice can be compensated by an award of throw away costs as the court may grant. As proposed by Sheridan J. in *Sebei District Administration case*, supra, it would be wrong to shut out the defendant (appellant herein) who has a triable defence but he should be "visited with severe order as to costs."

26. In exercise of the discretion of the court under section 27 of the *Civil Procedure Act*, the court sets the costs of the appeal at Ksh 150,000/- to be paid by the appellant to the respondent.

Orders

27. Consequently, for the reasons set out hereinabove, the appellant's appeal is allowed in the following terms:

    1. The ruling of the trial court dated October 19, 2020 is hereby set aside.

    2. The appellant is granted leave to enter appearance and defend the suit.

    3. The respondent is entitled to thrown away costs assessed by the court at Ksh 150,000/- to be paid within 30days from the date of the judgment.

    Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF DECEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kimondo Gachoka & CO. Advocates the Appellant.

M/S F. J. Mugamb & Co. Advocates for the Respondents.